TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~318.~~ 114

CHARLES MERRYMAN, PLAINTIFF IN ERROR,

vs.

E. W. BOURNE, F. A. WOODWORTH, S. E. WOODWORTH, JOHN DOE, RICHARD ROE, GEORGE GREENE, ——— BAGALEY, ——— WETHERED, ——— TIFFANY, PETER SMITH, HENRY JONES, THOMAS STILES, JAMES NOKES AND DAVID BROWNE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED DECEMBER 1, 1868.

SUPREME COURT OF THE UNITED STATES.

No. 313.

CHARLES MERRYMAN, PLAINTIFF IN ERROR,

vs.

E. W. BOURNE, F. A. WOODWORTH, S. E. WOODWORTH, JOHN DOE, RICHARD ROE, GEORGE GREENE, ——— BAGALEY, ——— WETHERED, ——— TIFFANY, PETER SMITH, HENRY JONES, THOMAS STILES, JAMES NOKES AND DAVID BROWNE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Writ of error	A	1
Complaint in ejectment	1	2
Summons	4	3
Answer	6	4
Stipulation waiving jury	7	5
Findings	8	5
Judgment	14	7
Bill of exceptions	16	8
Stipulation and order	26	12
Order	27	12
Citation	28	13
Opinion	30	13
Certificate to opinion	40	17

A UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the Circuit Court of the United States, held in and for the district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court before you, between Charles Merryman as plaintiff and E. W. Bourne, F. A. Woodworth, S. E. Woodworth, John Doe, Richard Roe, George Greene, —— Bagley, —— Wethered, —— Tiffany, Peter Smith, Henry Jones, Thomas Stiles, James Nokes and David Browne, as defendants, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at said court, in the city of Washington, on the first Monday of December next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this sixth day of April, A. D. and of the independence of the United States the ninety-second.

[SEAL.] GEO. W. WHITNEY,
Clerk U. S. Circuit Court, Dist. of California.

The above writ of error is hereby allowed.

STEPHEN J. FIELD,
Associate Justice of U. S. Sup. Court.

The answer of the judges of the Circuit Court of the United States for the District of California.

The record and proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court to the Supreme Court of the United States within mentioned at the day and place within contained in a certain schedule to this writ attached, as we are within commanded.

By the court.

[SEAL.] GEO. E. WHITNEY, *Clerk.*

Endorsed: United States Circuit Court, dist. of California. Charles Merryman vs. E. W. Bourne et al. Writ of error. United States Circuit Court, district of California. Charles Merryman et al. plaintiff in error, vs. E. W. Bourne, et al. defendants in error.

Transcript of record, &c., on writ of error to the Supreme Court of the United States.

1 In the United States Circuit Court for the districts of California, northern district.

CHARLES MERRYMAN
vs.
E. W. BOURNE, F. A. WOODWARTH, S. E. Woodwarth, John Doe, Richard Roe, George Green, —— Bagley, —— Wethered, —— Tiffany, Peter Smith, Henry Jones, Thomas Stiles, James Nokes and David Brown, whose real names are unknown to plaintiff.

The above named pl'ff brings this action against the above-named defendants, and pl'ff avers and charges the facts to be, that he is a native and citizen of the State of Maryland, United States, and a resident of the city of Baltimore, in said State, and that the defendants above named are all residents of the State of California, and of said northern judicial district, and are citizens of the State of California. And for a cause of action against the defendants, plaintiff avers and charges the facts to be, that on the 11th day of April, A. D. 1855, he, the said plaintiff, was the owner in fee simple, and seized of and was in possession of that certain piece or parcel of land situate in the city and county of San Francisco, and State of California and in said northern district, bounded and described as fol-

2 lows: Commencing at a point on the southerly line of Market st., distant from the southwesterly line of Market and Second sts. one hundred and fifty-five feet, in a westerly direction; thence running west on the line of Market street, eighty feet; thence at a right angle, southerly one hundred and fifty-five feet, more or less to Stevenson st.; thence at a right angle easterly on the line of Stevenson st. eighty feet; and thence at a right angle northerly, one hundred and fifty-five feet, more or less to the place of beginning. And also of that other lot of land lying in said city, county, State, and district as aforesaid, bounded as follows: Commencing at a point on the said southerly line of Market street, distant one hundred feet westerly from the southwesterly corner of Market and Second sts.; thence running westerly along the line of Market st., fifty-five feet; thence at a right angle southerly, one hundred and fifty-five feet, more or less to Stevenson st.; thence easterly along the line of Stevenson st., fifty-five feet; and thence at a right angle southerly, one hundred and fifty-five feet, to the place of beginning. That on the 22nd day of April, A. D. 1855, the defendants above named, not claiming to have and not having any right or title to any portion of said premises, wrongfully and unlawfully entered into the

3 possession of the said premises and ousted and ejected the said plaintiff from the possession thereof, and have ever since

wrongfully and unlawfully continued in the possession thereof, and that the defendants above-named, now are in the wrongful and unlawful possession of said premises.

That the monthly rent or value of the use and occupation of the said premises since the said 22nd day of April, A. D. 1855, is the sum of $500 per month, and plaintiff therefore avers the fact to be, that he has sustained damages by reason of defendants' wrongful and unlawful detention and occupation of said premises to the amount of thirty thousand dollars.

Wherefore the plaintiff demands judgement against the defendants that the plaintiffs be adjudged to be the owner of and entitled to the possession of the said premises. That the possession and occupation thereof by defendants be adjudged to be and to have been wrongful and unlawful. That plaintiff have judgement against defendants for the possession of said premises, and that plaintiff recover against defendants the sum of thirty thousand dollars for the unlawful detention and occupation of said premises by said defendants.

W. W. STOWE,
Attorney for Pl'ff.

Filed April 10, 1860.

CUTLER McALLISTER, *Clerk.*

4 In the Circuit Court of the United States for the district of California, in and for the northern district.

Summons.

CHARLES MERRYMAN, plaintiff,
vs.
E. W. BOURNE *et al.*, defendants.

UNITED STATES OF AMERICA:

The President of the United States of America, greeting:

Action brought in the said Circuit Court, and the complaint filed in the city and county of San Francisco, in the office of the clerk of said Circuit Court.

E. W. Bourne, F. A. Woodwarth, S. E. Woodwarth, John Doe, Richard Roe, George Green, —— Bagley, —— Wethered, —— Tiffany, Peter Smith, Henry Jones, Thomas Stiles, James Nokes and David Brown, whose real names are unknown to pl'ff.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the Circuit Court of the United States for the districts of California, and to file your plea, answer or demurrer to the complaint filed therein, (a copy of which accompanies this summons,) in the office of the clerk of said court
5 in the city and county of San Francisco, within ten days, (exclusive of Sundays and day of service,) after the service on you of this summons, if served in this county; or if served out of

this county, then within forty days, or judgement by default will be taken against you.

The said action is brought to recover possession of certain pieces or parcels of land situate in the city and county of San Francisco, northern district of California, together with thirty thousand dollars damages, &c., all of which is more particularly set forth in the complaint, and if you fail to appear and plead, answer, or demur, as herein required, judgment by default will be entered against you and each of you.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States of America, this 10th day of April, in the year of our Lord one thousand eight hundred and sixty, and of our independence the eighty-fourth.

Attest:

CUTLER McALLISTER, *Clerk.*

6 In the Circuit Court of the United States for the district of California.

Answer.

CHARLES MERRYMAN
vs.
E. W. BOURNE *et als.*

For answer to the complaint in the above-entitled cause, the defendants by their attorneys come and deny each and every allegation of said complaint.

And for a further and separate defence the said defendants say, that at the time of the commencement of this suit the said Frederick A. Woodworth was the owner in fee, and entitled to the possession of the premises described in the complaint, and he, the said Frederick A. Woodworth, and the other defendants claiming under him and with his license and permission, were and are, in the possession thereof under and by virtue of the said Woodwnrth's title to the said premises.

Wherefore they pray that said complaint be dismissed with costs.

CROCKETT & CRITTENDEN,
Attorneys for Defend'ts.

Filed May 25th, 1860.

CUTLER McALLISTER, *Clerk.*

7 In the Circuit Court of the United States for the northern district of California.

Stipulation waiving jury.

CHARLES MERRIMAN, plaintiff,
vs.
E. W. BOURNE *et al.*, defendants.

It is hereby stipulated and agreed that the above-entitled cause may be tried by the court without a jury, and the parties hereby expressly waive a jury in said cause.

San Francisco, 22 June, 1864.

W. W. STOW, *Att'y for Pl'ff.*
J. B. CROCKETT, *Att'y for Def'ts.*

Filed June 22d, 1864.

HENRY C. HYDE, *Clerk.*

In the Circuit Court of the United States for the districts of California, in and for the northern district.

8 *Findings.*

CHARLES MERRIMAN, plaintiff,
vs.
E. W. BOURNE *et als.*, defendants.

The above-entitled cause having been regularly called for trial, the parties plaintiff and defendants appeared by their respective attorneys, and thereupon, by a stipulation in writing duly made and signed by the attorneys of record for the respective parties aforesaid, and filed in said cause with the clerk of said court, a jury was waived, and it was agreed that said cause might be tried by the court without a jury; and the court having proceeded to hear the proofs adduced by the parties respectively, and having heard the arguments of counsel, and duly considered the same, doth find the facts to be as follows, to wit:

1st. That on the 15th day of April, 1847, there was duly issued by Edwin Bryant, then alcalde of the town of San Francisco, to Selim E. Woodworth, in due form, a grant in fee of the one

9 hundred vara lot, known and designated on the official map of said town as number twenty-two, and which embraces the premises described in the complaint in this action, and which grant was registered and recorded in a proper book of records deposited in the office, or custody, or control of the recorder of the county of San Francisco, on or before the third day of April, A. D. 1850.

2nd. That soon after said grant was issued the said Selim E. Woodworth entered into possession of the said lot numbered 22, and enclosed the same with a fence, and so continued in possession for some months then next ensuing.

3d. That subsequently the said fence, having either fallen down or been removed by trespassers, one Fulton, claiming under a grant

issued by one Colton, a justice of the peace, for said lot number 22, entered on a portion of said lot; and thereupon the said Woodworth in the year 1850 brought an action of ejectment against Fulton in the Court of First Instance, at San Francisco, to recover the possession of said premises so occupied by Fulton, in which action judgement was rendered in favor of said Woodworth for the recovery of the
10 possession of said premises, on which judgement a writ of restitution issued, by virtue of which said Woodworth was restored to the possession, after which the said Fulton appealed from said judgement to the Supreme Court of the State of California, by which court the said judgement was reversed and the said cause remanded; whereupon a final judgment was afterwards rendered in the lower court in favor of said Fulton, and thereupon, by virtue of process issued on said final judgement, the said Fulton was restored to his possessions, and he and those claiming under him continued in possession until they were afterwards ejected as hereinafter stated.

4th. That on or about the first day of January, 1852, the said Selim E. Woodworth, by a good and sufficient deed of bargain and sale, conveyed the said one hundred vara lot, numbered 22, including the premises in controversy, to Frederick A. Woodworth, who, in the years 1853 and 1854, instituted in the District Court of the 4th judicial district in and for the county of San Francisco, actions of ejectment against some of the parties in possession of said premises claiming under said Fulton, and recovered judgements in said actions for the possession of said premises; on which judge-
11 ments writs of restitution were duly issued and served, by virtue of which the said F. A. Woodworth was restored to the possession of the premises occupied by the defendants in said writs; and the remaining persons in possession of said premises under said Fulton, and who were not included in said ejectment suits, on being threatened with suits by said F. A. Woodworth to recover the possession of the premises held by them, and with a view to avoid expensive litigations, acknowledged the said Woodworth's title and took leases from him; at the expiration of which leases they surrendered the possession to said Woodworth. And the possession of said Woodworth, so obtained under writs of restitution and by surrender, was fairly and honestly acquired, without force, fraud, or surprise.

5th. That on the 12th December, 1849, one Colton, a justice of the peace of San Francisco, issued a grant to one Atwill for the said one hundred vara lot, No. 22, and on the 11th February, 1850, the said Atwill conveyed to the said Fulton whatever title he acquired by said grant in and to the premises in controversy; and the plaintiff, before and at the time of the institution of this suit, had acquired and held by regular mesne conveyances all the title of said
12 Fulton.

6th. That at the time of the commencement of this action the said Frederick A. Woodworth, and the other defendants under a license from him, were in possession of the premises in controversy.

And as conclusions of law from the facts aforesaid, the court decides and finds as follows, to wit:

1st. That the grant from the said Colton, justice of the peace as aforesaid, to said Atwill was null and void, and conveyed no title to the premises in controversy; and that the judgement in the aforesaid suit of Woodworth vs. Fulton was in no respect an affirmance of the validity of the title of the said Fulton, but only a disaffirmance of the validity of the title of Woodworth, the plaintiff in that suit, as the said title was then set up and held by him.

3d. That as against the defendants in this suit peaceably in possession of the premises in controversy, the plaintiff must recover on the strength of his own title; that the title set up by him is invalid, and the judgment aforesaid does not estop the defendants to deny the validity of said plaintiff's title.

13 4th. That the judgment aforesaid is a decision that the defendant Woodworth's title, as then held by him, is invalid, but it does not estop him to set up any title to said premises acquired since the said judgement.

4th. That by virtue of an act of the legislature of the State of California, "entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," approved March 11th, 1858, and by virtue of the ordinances referred to in said act and of the 5th section of the act of Congress entitled "An act to expedite the settlement of titles to lands in the State of California, approved July 1, 1864, all the title of the United States, and of the city of San Francisco, in and to the premises in controversy became and was vested in the said Frederick A. Woodworth, now deceased, and by virtue thereof the said Selim E. Woodworth, as executor of the said Frederick A. Woodworth, deceased, is entitled to the possession of the premises described in the complaint and every part theseof.

Wherefore it is ordered that judgment be entered in favor of the defendants.

STEPHEN J. FIELD,
OGDEN HOFFMAN,
Judges of the Circuit Court.

Filed June 26th, 1865.

GEO. C. GORHAM, *Clerk.*

Judgment.

14 CHARLES MERRIMAN
vs.
I. W. BOURNE *et al.*

The above-entitled cause having been regularly called for trial, the parties plaintiff and defendant appeared by their respective attorneys, and thereupon the said parties, by a stipulation in writing duly signed by their respective attorneys and filed with the clerk

in said cause, waived a jury, and agreed that the issue might be tried by the court without a jury; and thereupon the court having heard and duly considered the testimony adduced by the said parties, and the argument of counsel, and having thereupon filed in said cause its findings of fact and its conclusions of law, whereby it was ordered that judgement be entered in favor of the defendants;

It is thereupon adjudged, ordered and decreed, that the plaintiff take nothing by his action; that the defendants go hence without day, and that they recover of the plaintiff their costs in this behalf expended, which are taxed at $, and that they have execution therefor.

Dated June 26th, 1865.

S. J. FIELD,
OGDEN HOFFMAN,
Judges of the Circuit Court.

Judgement filed 26 June, 1865.

GEO. E. GORHAM, *Clerk.*
By HEUSTIS, *Dep.*

In the Circuit Court of the United States for the district of California, in and for the northern district.

Bill of exceptions.

CHARLES MERRIMAN
vs.
E. W. BOURNE *et als.*

Be it remembered that on the calling of this cause for trial on the 22nd day of June, A. D. 1864, a trial by jury was expressly waived by the parties hereto, by a stipulation in writing signed by them and filed with the clerk of this court, and the cause was tried by the court sitting without a jury; whereupon witnesses were examined on behalf of plaintiff and defendants, and documentary evidence was introduced. Plaintiff proved that he was in possession, by his tenants, of the land in controversy in this action in 1853, and down to the entry of defendants, as set out in the findings herein, and that all the parties referred to in the findings herein as claiming under Fulton were tenants of plaintiff; and other evidence was introduced by plaintiff and defendants; and thereafter the cause was taken under advisement by the court, and thereafter the court made and found the following as its findings of facts and conclusions of law in the the case, to wit:

"The above-entitled cause having been regularly called for trial, the parties, plaintiff and defendants appeared by their respective attorneys; and thereupon, by stipulation in writing duly made and signed by the attorneys of record for the respective parties aforesaid, and filed in said cause with the clerk of said court, a jury was waived, and it was agreed that said cause might be tried by the court, without a jury; and the court having proceeded to hear the

proofs adduced by the parties respectively, and having heard the argument of counsel, and duly considered the same, doth find the facts to be as follows, to wit:

1st. That on the 15th day of April, 1847, there was duly issued by Edwin Bryant, then alcalde of the town of San Francisco, to Selim E. Woodworth, in due form, a grant in fee of the one hundred vara lot known and designated on the official map of said town as number twenty-two, and which embraces the premises described in the complaint in this action, and which grant was registered and recorded in a proper book of record deposited in the office, or custody or control of the recorder of the county of San Francisco, on or before the third day of April, A. D. 1850.

2nd. That soon after said grant was issued, the said Selim
18 E. Woodworth entered into possession of the said lot numbered 22, and enclosed the same with a fence, and so continued in possession for some months thence next ensuing.

3rd. That subsequently, the said fence having either fallen down or been removed by trespassers, one Fulton, claiming under a grant issued by one Colton, a justice of the peace, for said lot 22, entered on a portion of the said lot; and thereupon the said Woodworth, in the year 1850, brought an action of ejectment against Fulton, in the Court of First Instance, at San Francisco, to recover the possession of said premises, so occupied by Fulton, in which action judgement was rendered in favor of said Woodworth, for the recovery of the possession of said premises; on which judgement a writ of restitution issued, by virtue of which said Woodworth was restored to the possession; after which the said Fulton appealed from said judgement to the Supreme Court of the State of California, by which court the said judgement was reversed and the said cause remanded; whereupon a final judgement was afterwards rendered in the lower court in favor of said Fulton; and thereupon, by virtue of process issued on said final judgement, the said Fulton was restored to his possession, and he and those claiming under him continued in possession until afterwards ejected, as hereinafter stated.

19 4th. That on or about the first day of January, 1852, the said Selim E. Woodworth, by a good and sufficient deed of bargain and sale, conveyed the said one hundred vara lot, numbered 22, including the premises in controversy, to Frederick A. Woodworth, who in the year 1853 and 1854 instituted in the District Court of the 4th judicial district in and for the county of San Francisco actions of ejectment against some of the parties in possession of said premises claiming under said Fulton, and recovered judgements in said actions for the possession of said premises, on which judgements writs of restitution were duly issued and served, by virtue of which the said F. A. Woodworth was restored to the possession of the premises occupied by the defendants in said suits; and the remaining persons in possession of said premises under said Fulton, and who were not included in said ejectment suits, on being threatened with suits by said F. A. Woodworth to recover the possession of the premises held by them, and with a view

to avoid expensive litigation, acknowledged the said Woodworth's title and took leases from him, at the expiration of which leases they surrendered the possession to said Woodworth. And the possession of said Woodworth, so obtained under writs of restitution and by surrender, was fairly and honestly acquired, without force,
20 fraud or surprise.

5th. That on the 12th December, 1849, one Colton, a justice of the peace, at San Francisco, issued a grant to one Atwill for the said one hundred lot, No. 22, and on the 11th February, 1850, the said Atwill conveyed to the said Fulton whatever title he acquired by said grant in and to the premises in controversy. And the plaintiff, before and at the time of the institution of this suit, had acquired and held by regular mesne conveyances all the title of said Fulton.

6th. That at the time of the commencement of this action, the said Frederick A. Woodworth, and the other defendants under a license from him, were in possession of the premises in controversy.

And as conclusions of law from the facts aforesaid, the court decides and finds as follows, to wit:

1st. That the grant from the said Colton, justice of the peace aforesaid, to the said Atwill was null and void, and conveyed no title to the premises in controversy; and that the judgement in the aforesaid suit of Woodworth vs. Fulton was in no respect an affirmance of the validity of the title of the said Fulton, but only a disaffirmance of the title of Woodworth, the plaintiff in that suit, as the said title was then set up and held by him.

21 2nd. That as against the defendant in this suit, peaceably in possession of the premises in controversy, the plaintiff must recover on the strength of his own title; that the title set up by him is invalid, and the judgment aforesaid does not estop the defendants to deny the validity of said plaintiff's title.

3rd. That the judgement aforesaid is a decision that the defendant Woodworth's title as then held by him is invalid, but it does not estop him to set up any title to said premises acquired since the said judgement.

4th. That by virtue of an act of the legislature of the State of California, entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of said city," approved March 11th, 1858, and by virtue of the ordinances referred to in said act, and of the 5th section of the act of Congress entitled "An act to expedite the settlement of titles to lands in the State of California," approved July 1st, 1864, all the title of the United States and of the city of San Francisco in and to the premises in controversy became and was vested in the said Frederick A. Woodworth, now deceased, and by virtue thereof the said Selim E. Woodworth as executor of the said Frederick A. Woodworth, deceased, is entitled to the possession of the premises described in the com-
22 plaint and every part thereof" which said findings were duly filed in this court, and thereupon the judgment of this court was rendered in favor of the defendants herein, and against the plain-

tiff, for the possession of the land described in the complaint herein, and their costs of suit.

And plaintiff now excepts to the finding as a fact by the court, that the possession of the premises in question obtained by the defendant Wooodworth under writs of restitution and by surrender was fairly and honestly acquired, without force, fraud, or surprise, on the ground that the said finding was not supported by the evidence adduced in the case, and was contrary to the weight of said evidence, and because the court did not find from said evidence that the possession so obtained by said Woodworth was in subordination to the right of plaintiff herein.

And plaintiff now excepts to the said findings and to the judgment entered thereon in favor of defendants and against plaintiff, and says that said findings and the judgment entered thereon are against law in this:

First. That the findings by the court as a conclusion of law that the grant from Colton, justice, to Atwill conveyed no title to
23 the premises in question, is contrary to law.

Second. That the findings by the court, as a conclusion of law, that the judgement in the suit of Woodworth vs. Fulton was not an affirmance of the title of Fulton to the premises in question, was contrary to law and the facts found by the court, and not supported by the facts found in the case.

Third. That the findings by the court as a conclusion of law, that defendants are not estopped from denying plaintiffs' title to the premises in question, is against law, and contrary to the facts found by the court, and not supported by the facts found.

Fourth. That the findings by the court, that the judgement in Woodworth vs. Fulton, does not estop defendants from denying the validity of plaintiff's title, is against law.

Fifth. That the court erred in not finding as a conclusion of law from the facts found, that the possession of defendants was in subordination to the right of the plaintiff herein; defendants having entered under plaintiff's tenants, without notice to plaintiff.

Sixth. Because the finding by the court, as a conclusion of law, that the ordinance known as the Van Ness ordinance and the
24 act of the legislature of the State of California, ratifying the same, and the act of Congress of July 1st, 1864, referred to in the said finding confirm or make valid the title of defendants as against the title of plaintiff, is against law.

Seventh. Because the finding by the court as a conclusion of law from the facts, that defendants were entitled to a judgement as against plaintiffs is contrary to law.

Eight. Because, from the facts found, the judgement of the court should have been in favor of plaintiff and against defendants, instead of in favor of defendants.

And the plaintiff prays that this his bill of exceptions may be signed, sealed, and enrolled, which is done.

OGDEN HOFFMAN,
Dist. Judge.

Mr. Jarboe presented to me a bill of exceptions in this case for examination some months ago, as he stated at the time, at the request of Judge Hoffman and within the time, as he stated, allowed by the order of the judge for filing his exceptions. I was prevented by other engagements from examining them for a considerable time, and if the original exceptions were presented by him to the
25 judge within the time allowed, I waived my objections founded on any subsequent delay. I have examined the foregoing exceptions and have no amendment to propose to them.

San Francisco, 7th Nov., 1865.

J. B. CROCKETT,
Att'y for Def't's.

U. S. Circuit Court.

26 *Stipulation and Order.*

MERRIMAN, pl'ff,
vs.
BOURNE *et al.*, deft's.

Let plaintiff herein have ten days from date in which to prepare, file and serve bill of exceptions to findings and judgement herein.

San Francisco, August 7th, 1865.

OGDEN HOFFMAN,
Dist. Judge.

We hereby consent that the foregoing order may be made and entered in the above entitled suit.

San Francisco, Aug. 7th, 1865.

J. B. CROCKETT,
Att'y for Def'ts.

Filed Aug. 8, 1865.

GEO. C. GORHAM, *Cl'k,*
By HUESTIS, *Dep. Cl'k.*

27 U. S. Circuit Court.

Order.

MERRIMAN, pl'ff,
vs.
BOURNE *et al.*, def'ts.

Let plaintiff herein have 2 days further from date in which to prepare, file and serve bill of exceptions to findings and judgement herein.

San Francisco, Aug. 17th, 1865.

OGDEN HOFFMAN, *Dist. Judge.*

Filed Aug. 17th, 1865.

GEO. C. GORHAM, *Cl'k.*
By W. F. HEUSTIS, *Dep. Clerk.*

28 *Citation.*

UNITED STATES OF AMERICA, *ss*:

To E. W. Bourne, F. A. Woodworth, S. E. Woodworth, John Doe, Richard Roe, George Green, —— Bagley, —— Wethered, —— Tiffany, Peter Smith, Henry Jones, Thomas Stiles, John Nokes and David Brown, greeting:

You are hereby cited and admonished to be and appear at the next session of the Supreme Court of the United States, to be held in Washington city, on the first Monday of December, A. D. 1868, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, wherein Charles Merryman is plaintiff and you are defendants in error, to show cause, if any there be, why the judgement in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

October 2d, 1868.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

29 OCTOBER 8*th*, A. D. 1868.

Service of a copy of the within original citation is hereby acknowledged.

J. B. CROCKETT,
Att'y for Def'ts.

Filed 12 October, 1868.

GEO. E. WHITNEY, *Clerk.*

I, George E. Whitney, clerk of the Circuit Court of the United States for the district of California, do hereby certify that the foregoing twenty-nine pages of writing constitute a full, true and correct copy of the pleadings and proceedings on file and of record in my office in the case of Charles Merryman, plaintiff in error, against E. W. Bourne et al., defendants in error, and that the same constitute the return of the judges of the Circuit Court to the annexed writ of error.

Witness my hand and the seal of said court, at San Francisco, this 23d day of October, A. D. 1868, and of the independence of the United States the ninety-third.

[SEAL.] GEO. E. WHITNEY, *Clerk.*

30 *Opinion.*

CHARLES MERRIMAN
vs.
E. W. BOURNE *et als.*

This was an action of ejectment tried before the judges of the Circuit Court. The only facts necessary to be noticed under the views we have adopted, with regard to this case, are the following:

On the 15th April, 1847, S. E. Woodworth obtained from Edwin

Bryant, alcalde of San Francisco, a grant for the 100 vara lot known as No. 22, and which embraces the premises in controversy.

Shortly after receiving this grant he appears to have taken possession of the lot and enclosed it with a fence, which remained for some months, but which in 1849 had either fallen down, or been removed by parties who entered on the premises claiming under a grant made to one Fulton by Colton, a justice of the peace. Woodworth thereupon brought ejectment in the Court of 1st Instance, and having recovered judgement ejected the persons who had taken possession of the lot.

An appeal having been taken to the Supreme Court the
31 judgement was reversed, and a writ of restitution was awarded to restore the defendants in that suit to the possession of the premises from which they had been ejected under the writ of possession.

From the report of the case (1st Cal., 295) it appears that the plaintiff claimed to recover 1st on his grant as constituting a perfect title to the lot, and 2dly on a possession prior to the entry of the defendant.

The court held, 1st, that the grant by the alcalde was void and insufficient to give even color of title.

And 2d. That the prior possession, as shown by the evidence, was too loose, indefinite and equivocal to authorize a recovery against a defendant who had entered peaceably without fraud.

From the date of the writ of restitution awarded under this judgement up to 1853, the lot, or a large portion of it, appears to have been in the possession of parties claiming under Fulton; but in 1853 F. A. Woodworth, to whom Selim E. Woodworth had conveyed the land, instituted ejectments against the parties in possession, and in the course of the years 1853, 1854 and 1855, he succeeded in
32 obtaining possession of the whole lot, which he still holds.

In numerous instances the parties in possession were ejected under writs of possession issued in pursuance of judgments obtained in ejectment suits.

In other cases the persons being threatened with suits, and desiring to avoid expense, and to have the privilege of removing their houses erected on the lot, consented to acknowledge the title of Woodworth, and to accept leases under him as his tenants.

The plaintiff in the present suit derives title from Fulton, one of the defendants in the former suit, and the defendant holds under F. A. Woodworth, the grantee of S. E. Woodworth.

On the trial of the cause the pl'ff offered in evidence, as showing color of title, a grant from J. A. Colton, justice of the peace, to Joseph F. Atwill, dated December 21, 1849, and a deed from Atwill to Fulton dated February 11th, 1850. He also produced the record of the suit of Woodworth vs. Fulton with the writ of restitution under which Fulton was restored to the possession.

Some testimony was also introduced, tending to show a
33 possession by Fulton prior to 1849. But the evidence was indefinite and unsatisfactory. And it was not urged by counsel as sufficient to constitute a ground of recovery.

The defendant introduced and proved the alcalde grant before alluded to, together with the records of the various ejectment suits, in which he had recovered possession of different parcels of the land. He also proved the circumstances under which he had obtained possession of other portions of the lot without suit.

To the introduction of the alcalde's grant. the pl'ff's counsel objected on the ground that the decision in Woodworth vs. Fulton was a final judgement, involving and determining the invalidity of the grant relied on as a defence to this action. That this determination was, and is, not only the law of that case, but the law of that piece of property, and that the defendant, Woodworth, and all claiming under him are forever barred from setting up that title as against Fulton and his privies, and this notwithstanding that the case of Woodworth vs. Fulton has been overruled, and alcalde grants
34 similar to the one relied in that case have been subsequently adjudged to constitute valid titles.

On these grounds the counsel for pl'ff contendended not only that the grant should not be received in evidence, but also that the pl'ff was entitled to a verdict.

We are clear that both these positions are untenable. Conceding the law to be precisely as claimed by the plaintiff, and admitting that the judgement of the Supreme Court declaring the alcalde grant to be wholly void, remains the law of the case and of this piece of property, forever binding on Woodworth and his representatives claiming under that title, it by no means follows that the pl'ff is entitled to recover.

The judgement of the Supreme Court at most determined that the title relied on by Woodworth was invalid.

It in no respect affirmed the validity of the title of the defendant on that suit.

The case did not, and could not, have involved any inquiry
35 into the validity of the Colton grant, under which the defendant claimed title. Had it done so, it is obvious that the court must have pronounced it to have been wholly void and insufficient to give color of title.

Whatever effect therefore the judgement may have had as a bar to any future assertion of Woodworth, or his privies of any title under that grant, it would have no effect whatever as an affirmance of Fulton's rights under the Colton grants, nor to impart to that grant in his hands, even as against Woodworth, any validity as an independent source of title.

Since that suit Woodworth has, without force, fraud or surprise, obtained possession of the lot in question, and his tenants are now sued by the grantee of Fulton. Conceding that Woodworth can claim nothing under his grant, he is nevertheless in possession of the land, and this plaintiff in ejectment, like any other, must recover in the strength of his own title. He has failed to show any prior possession, and the Colton grant produced by him, is not pretended to possess any validity whatever as a source of title. Under
36 these circumstances it is clear to us he must fail.

2dly. But the title set up by the defendant is not the same title as that passed upon by the Supreme Court in Woodworth vs. Fulton.

It, of course, will not be contended that the judgment in that suit operates as a bar to [to] the assertion by Woodworth of any subsequently acquired title to the premises in controversy.

Assuming then that the decision of the Supreme Court was not only the law of the case, but was in all respect correct, and that a grant by an alcalde possessed per se no validity whatever, the subsequent action by the legislature of this State and by Congress in respect to this class of titles, has imparted to them unquestionable validity.

In the act of the legislature of California "passed March 11th, 1858, the provisions of the ordinance of the common council of this city, No. 822, passed June 20th, 1855, are recited.

In section 2d of these ordinances it is provided that "all persons who hold grants to lots of land lying east of Larkin st. and
37 northeast of Johnson street, made by any ayuntamiento, town council or alcalde of said Puebla since 1846, and before the incorporation of the city of San Francisco by the State of California, and which grant or the material portion thereof was registered or recorded in a proper book of record deposited in the office or custody or control of the recorder of San Francisco, on or before the 3d day of April, 1850, shall for all purposes contemplated by this ordinance be deemed to be the possessors of the land so granted, although the said lands may be in the actual occupancy of persons holding the same adversely to the said grantees."

The 2d section of the act above cited provided that "the grant of relinquishment of title made by the said city in favor of the several possessors, by sections 2 and 3 of the ordinance just above recited, shall take effect as fully and completely for the purpose of transferring the city's interest, and for all other purposes whatever, as if deeds of release and quitclaim had been duly executed and delivered to and in favor of them individually and by name; and no further conveyance or other act shall be necessary to invest said pos-
38 sessors with all the interest, rights, title, benefits and advantages which the said order and ordinances entered or purport to transfer and convey according to the true intent and meaning thereof."

By the 5th section of the act of Congress of July 1st, 1865, it is provided that "all the right and title of the U. S. to lands within the the corporate limits of the city of San Francisco as defined in the act incorporating said city, passed by the legislature of the State of California, on the 15th April, 1851, are hereby relinquished and granted to said city and its successors, for the uses and purposes specified in the ordinances of said city, ratified by an act of the legislature of the said State, approved on the 11th of March, 1858, entitled 'An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city, there being excepted from this relinquishment, and grant all sites or other parcels of land which have been and now are occupied by the U. S. for military, naval, and other uses, &c., &c., &c.'"

It is not disputed that the grant under which the defendant claims falls within the class mentioned in the 2d section of ordinance
39 822. This ordinance by the express terms of the act of March 11th, 1858, operates as a full and complete grant of relinquishment of the title of the city in favor of the persons therein described, and Congress has, by the act above cited, granted and relinquished to the city for the uses and purposes mentioned in said ordinance, and in the act ratifying it, all the right and title of the U. S.

Whatever, therefore, may have been the invalidity or even nullity of the grant under which the defendant claims, at the time the judgment in Woodworth vs. Fulton was rendered, it has since become a valid and indefeasible title by the grant and relinquishment of title, to him, by the city, by the State of California, and by the U. S. The title he now sets up is thus radically different from that relied on in his former suit, and no judgment in that suit declaring the grant to be invalid, can estop from asserting in this suit his subsequently acquired title derived from every source from which title could flow, viz., from the city, from the State, and from the Congress of the U. S.

Judgment must therefore be entered for defendant. I have the satisfaction of stating that Mr. Justice Field entirely concurs in
40 these views herein expressed.

HOFFMAN, *J.*

June 2d, 1863.

Certificate to opinion.

I, George E. Whitney, clerk of the Circuit Court of the United States for the district of California, do hereby certify that the foregoing eleven written pages are a true copy of the opinion of the court rendered on the decision of the cause of Charles Merriman v. E. W. Bourne et al.

In testimony whereof I have hereunto set my hand and the seal of said court this 23d day of October, A. D. 1868.

[SEAL.] GEO. E. WHITNEY,
Clerk.

No. 313.

IN THE

SUPREME COURT

OF THE

UNITED STATES

In Error to the Circuit Court of the United State for the District of California.

CHARLES MERRYMAN,

Plaintiff in Error,

vs.

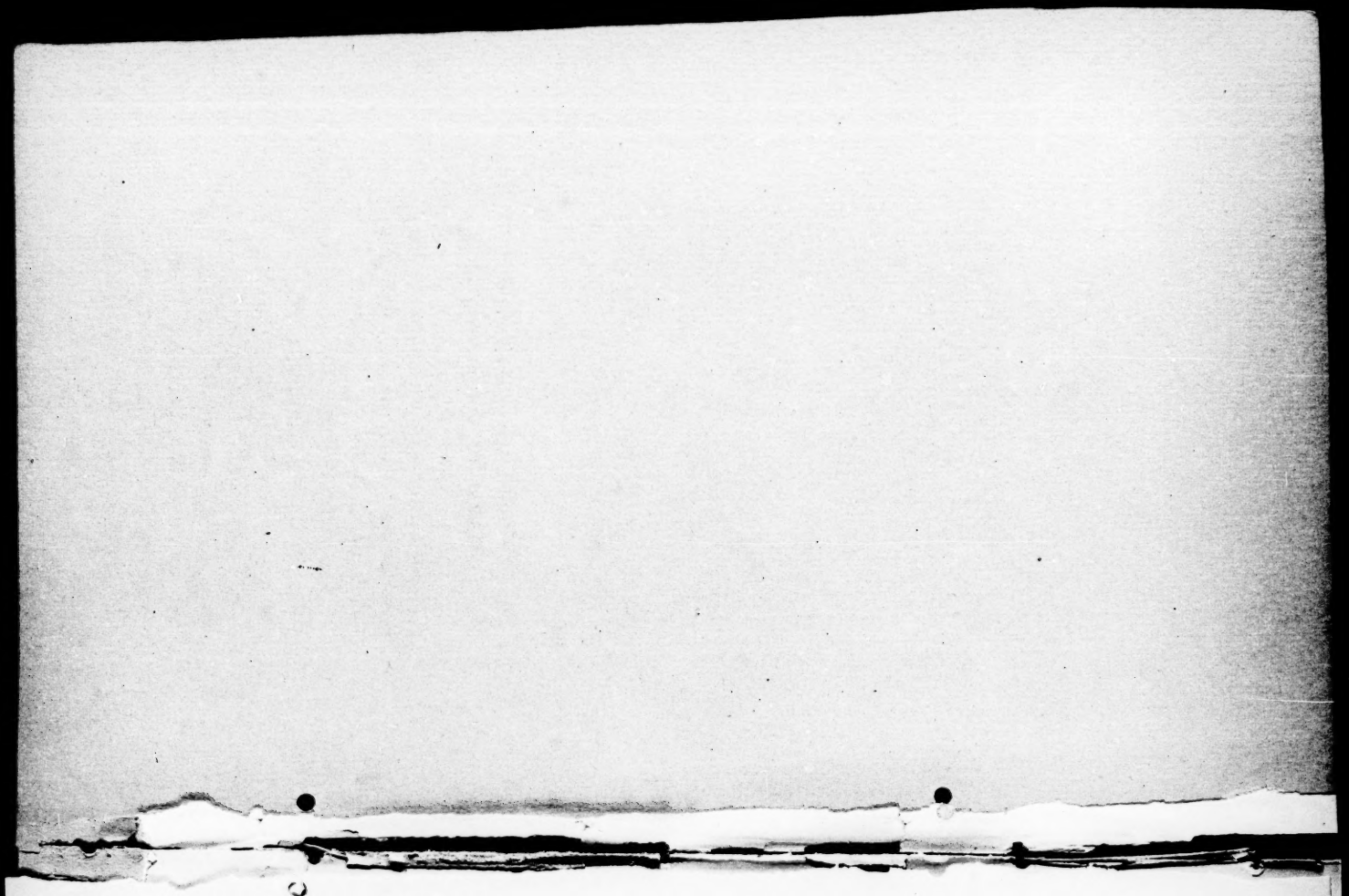
E. W. BOURNE and others,

Defendants in Error.

Brief for Appellant.

GEORGE TURNER,
W. H. PATTERSON,
JARBOE & HARRISON,
Counsel for Plaintiffs in Error.

SAN FRANCISCO:
E. BOSQUI AND CO., PRINTERS, LEIDESDORFF ST. COR. CLAY.
1860.



IN THE SUPREME COURT

OF THE

UNITED STATES.

CHARLES MERRYMAN,
Plaintiff in Error,

vs.

E. W. BOURNE, and others,
Defendants in Error.

In Error to the Circuit Court of the United States for the District of California.

This is an action of ejectment for certain premises situate within the city of San Francisco, State of California.

The plaintiff respectfully submits that he has connected himself by proper mesne conveyances with such title and right of possession as William Fulton originally had in these premises, and such title as Fulton *et al.*, had at the commencement of the action of Woodworth vs. Fulton (which determined the title in these premises to be in Fulton *et al.*, and not in Woodworth), reported in 1st Cal-

ifornia Supreme Court Reports, page 295, *et sequitur*.

Upon the Transcript in this cause, top paging 10, section 5, in the bill of exceptions, this fact is stated as follows: "5" That on the 12th of December, 1849, one Colton, a Justice of the Peace, at San Francisco, issued a grant to one Atwell for the said one hundred (vara) lot No. 22, and on the 11th of February, 1850, the said Atwell conveyed to the said Fulton whatever title he acquired by said grant in and to the premises in controversy. And the plaintiff before and at the time of the institution of this suit had acquired and held by regular mesne conveyances all the title of said Fulton."

It being thus established that the plaintiff here had all the title of Atwell and Fulton, we present the following propositions as conclusive of this cause in our favor:

First. The Supreme Court of California decided in the case of Woodworth vs. Fulton, above cited, that the title of Woodworth in these premises was "invalid," and gave judgment in favor of Fulton. This was the decision of the highest tribunal of the State; it became the law of the case, and the law of this piece of property. It stands to-day unreversed and unannulled, and under it Fulton was placed in possession of this property.

Second. F. A. Woodworth (after being so defeated in the Supreme Court of the State) secured the possession again by actions of ejectment in a minor Court against "some of the parties in possession," and by "threatening others,"

got them to acknowledge the said Woodworth's title, and take leases from him ; at the expiration of which leases they surrendered the possession to Woodworth." *Vide* Transcript, bottom of page 9 and page 10.

On this latter state of fact, said F. A. Woodworth is shown, as we claim, to have surreptitiously gained possession by tampering with the tenants of Plaintiff in Error, for the purpose of defeating the decision of the highest tribunal of the State, and thus became himself the tenant of Fulton, and is estopped from denying his title.

Third. The prior possession by Woodworth of this property was also set up in Woodworth vs. Fulton (1 Cal. 295), and this was adjudicated against Woodworth also, the Court holding "that his acts were too loose, and equivocal to support a claim of possession" (1 Cal. p. 311.)

Now as to our first proposition it was held in Woodworth vs. Fulton, 1st California Supreme Courts Reports, p. 295, etc., that the judgment in that case determined first that Woodworth was not the owner, and not entitled to the possession of the premises in question described in the complaint in that action, because the complaint in that action claimed to recover upon (and averred) *title* as his chief ground of recovery, and also claimed to recover upon prior possession. See first point of Hon. E. Norton in 1st Cal. 297. See also pages 308, 309, 310. "The plaintiff (Woodworth) never was in the actual *possession* of this lot," see 310, 311.

By these references to the said decision it will be

seen that not *prior possession* but *title* was the chief question adjudicated there.

It will be also observed, that by virtue of the *proceedings* in that action, the defendants, Fulton *et al.*, (under whom we claim and whose title the Court finds we have) were restored to the possession of such premises.

Further, that it was therein determined that by virtue of the Writ of Restitution issued from the Court of *First Instance*, the defendants (Fulton, etc.,) were wrongfully *ousted*.

After these proceedings, they never abandoned that possession but leased the premises after the entry of judgment, in accordance with the Remittitur and decision in 1st California, and by *threats* and arrangements with the *tenants* of Fulton's grantees, Woodworth entered into, and is now holding possession.

We hold that the decision in (1st Cal. Sup. Crt. Reports, p. 295, etc.,) case of Woodworth vs. Fulton, was a final judgment, involving and determining the *invalidity of the grant* which is relied upon as a defence to this action. Upon page 308 of 1st California (in said cause) the Court says: "For the above reasons I think the title of Plaintiff of *no validity*." Again, "his title is not even colorable."

We further respectfully urge that the decision of Woodworth vs. Fulton (1st Cal. 295), was a final judgment involving and determining the *invalidity of the grant* which is here relied on, and also that such determination was (and is) not only the law of that case but the law of *that piece of property*.

We also insist that for all time, the defendant, Woodworth and all claiming under him as against Fulton and the plaintiff (here) who is in privity with him are *barred from asserting that title.*

Brooms legal maxims, 246 (marginal).
Collins vs. Butter, 13 Cal.
Laird vs. Ridd, 15 Cal.
McDonald vs. Bear River Co., 15 Cal.

The same evidence which Woodworth relied upon in Woodworth vs. Fulton (1st Cal. 295), *i. e* the Alcalde grant, is now relied on as a defence to this action.

Brooms legal max. 229.
Starkie on Evidence (4 Am. Ed). 200.
Buller's N. P. 232 (quoted in Eastman vs. Cooper, 15 Pick. 285).
Baker vs. Rand, 13 Barb. 152.
Burkland vs. Brown, 5 Sand. 154.

The facts in Woodworth vs. Fulton (1 Cal. 295), as to Woodworth's title and right of possession are the same as in this case, and the *decision* in that case was upon the law of the Alcalde grant, *Vide*

Betts vs. Starr, 5 Conn. 550.
Peake vs. Chambers, 7 B. Monroe, 566.

Will it be pretended that while Fulton and his tenants and privies were in possession, under the Writ of Restitution and judgment in Woodworth vs· Fulton (1 Cal. 295), that they were trespassers on said premises, and that a judgment for mesne profits could have been recovered against them?

The law after a solemn determination placed them there, and they were therefore rightfully there. When did that right *cease?* Never by any act of theirs.

If the judgment in Woodworth vs. Fulton (1 Cal. 295), had been against Defendant (Fulton), it would have been conclusive of Woodworth's right to recover Mesne profits.

Aslin vs. Parkin, 2 Burrows, 666, 668.

Surely then it is equally conclusive that Woodworth could not recover mesne profits against Fulton or his privies.

The title was put in issue in that case, Fulton was in possession under *color of title* (the Colton grant); Woodworth averred and sought to prove a *title* which would give the right of possession to him; and in this state of case the judgment in the case (1 Cal. 295), is a bar to any subsequent action for the same cause.

Brewer vs. Beckwith, 35 Miss.
6 Georgia, 467.
Sims vs. Smith, 19 Geo. 124.
Payne vs. Treadwell, 16 Cal. 224.
Thomas vs. Griger, 2 Nott & McCord, 528.

In California the action of Ejectment as at common law was never used. Here it is "an action for the recovery of real property; or of an estate or interest therein; or for the determination in any form of such right or interest. *Vide* Practice Act, p. 18, 1st subdivision. This means some-

thing more than an action for the recovery of possession.

§ 27. "In an action affecting the *title* to real property" (a *lis pendens* may be filed, etc.)

§ 39, of the above Practice Act, provides, that "the Complaint shall contain a statement of the facts constituting the cause of action in ordinary and concise language."

Now prior possession is one fact—right of possession under a *lease* is another fact. Right of possession because the plaintiff has title is another.

And it is to be remembered that the final adjudication of Woodworth vs. Fulton was under the California Practice Ac .

Shittleworth vs. Hughey, 9 Rich. 389.
Bailey's Eq. R. 293.
Burch vs. Steinberg, 4 Cowen, 559.

The last of the above cases (Burch vs. Steinberg) holds, that the judgment is conclusive where *title* was in issue.

The same doctrine was held in Wood vs. Jackson, 8 Wend. 10; 18 Wend. 107.

We respectfully ask the Court to refer to 8 Wend. 45, determining a deed to be *invalid;* which is a controlling case upon this point. Now it is to be borne in mind that in Woodworth vs. Fulton (1 Cal. 295), the Court determined Woodworth's title to be *invalid.* "The plaintiff (says the Court) claimed to recover by virtue of a grant from an Alcalde of San Francisco, of which the following is a copy," (setting out the grant *verbatim*):

Under this head we would refer to Spooner vs. Davis, 7 Pick. 149.

Outram vs. Moorewood, 3 East 346.

That the decision of Woodworth vs. Fulton (1 Cal. 295), was (and is) the law of that piece of property; we refer to

Washington Brig. Co. vs. Stuart, 3 How. 424.

Oakley vs. Aspinwall, 13, N. Y. 500.

Clay vs. Hoagland, 6 Cal. 687. 12 Pet

Ex-parte Sibbald vs. U. S. ~~15 How.~~ 488.

The adjudication of Woodworth vs. Fulton (1 Cal. 295), was a construction of the law as to Woodworth's Alcalde grant, *vide* 15 Cal. 83.

The case of Matilda C. Gray vs. James W. Dougherty, reported in 25 California Rep. p. 271, etc., is analagous in some respects to this case; in a former action between the parties, which was plead in bar of this action, the Court trying that action *erroneously determined* the law, but although the Supreme Court so determined, yet it held *that judgment* (erroneous in law as it was) a bar to a second action on the same agreement.

Now let us apply this ruling to the case under discussion. Here one adjudication is that Woodworth's Alcalde grant is *not a title.* And this Court is asked by defendants to adjudge to the contrary because new Judges determined the law differently in other cases. If that (or a similar adjudication) is not the *law* of the *property* there can be no determination in California, which will *settle the title*, to

Real Estate and no matter if the owner has a perfect title, and it has been so adjudged, not once but a hundred times, he can be compelled to try it over again and again.

II.

Upon the second proposition that Woodworth having entered under our tenants, himself becomes our tenant and is estopped from asserting that plaintiff is not entitled to possession, we respectfully say. We have heretofore cited the Transcript (*vide* pages 9 and 10, section 4, of the Bill of Exceptions) to show that Woodworth (without any notice to the landlord) ousted a portion of the tenants by proceedings in Ejectment and by threats ousted others and without any proceedings at all.

Under an arrangement with our tenants, Woodworth would himself become our tenant and be stopped as aforesaid.

This principle is fundamental, but in support of it we will cite:

Adams on Ejectment, p. 275.
Jackson vs. Scissam, 3 John. 499, 223.
Jackson vs. ——— 5 Cowen, 123, 127, 120, 131, 134.
Chambers *et al.* vs. Pleak, 6 Daw. 428, 432.

III.

Now a few suggestions as to the opinion of the Honorable Judge, which is contained in this record.

Upon page 15, section 34, it will be noticed that

the Court says "that the case of Woodworth vs. Fulton has been overruled, and Alcalde grants similar to the one relied on in that case, have been subsequently adjudged to constitute valid titles." Now it is a settled principle of law that the fact that subsequent cases have been decided differently will not change the adjudication of a cause finally determined by the Supreme Court. It is notoriously true, and the Records of all the Courts show that Alcalde grants differ essentially in their form, and circumstances, mode of issue, delivery, etc., and the fact that later cases have been found in which some Alcalde grants have been affirmed will not effect Woodworth vs. Fulton, as that case stands unreversed to-day.

At the bottom of page 15, section 36, the Court will observe that the following language is used: "conceding that Woodworth can claim nothing under his grant, he is nevertheless in possession of the land, and this plaintiff in ejectment, like any other, must recover in the strength of his own title."

Now we respectfully say that Woodworth having failed in the Supreme Court of the State, wholly in his suit, has no right by threats against the tenants of Fulton to secure possession of the premises; if he does so, it is a clear attempt to defeat the judgment of the Court, and having entered under our tenants, he becomes himself a tenant and is estopped from denying our title.

He is in no better situation as to the tenants

against whom he proceeded without any notice to the landlord.

Upon page 16, section 37, the second section of the ordinance known as the "Van Ness Ordinance" is quoted, but it surely cannot be reasonably argued that if Woodworth had no title as adjudicated by the Supreme Court, and Fulton had the title, and under that title Fulton had been restored to possession by order of the Supreme Court; that afterwards by Legislative action this judgment of the highest tribunal of the State, was reversed and defeated. The plaintiff Woodworth deliberately elected to go into the Supreme Court and by its judgment he is bound; the case is *res adjudicata*, and beyond the reach of Legislative action. To permit this, would be to allow the Legislature to defeat the Judiciary.

But further, by the "Van Ness Ordinance" Woodworth cannot succeed, because it provides as follows: "Section 9. Although the city hereby renounces in favor of the actual possessors, in accordance with the provisions of section 2, any right or claim of its own, nothing in this ordinance is intended to prejudice *any other outstanding title to the said lands adverse to the said possessors.*"

By section 2d of the said "Van Ness Ordinance" it is enacted as follows: "And it is hereby declared to be the true intent and meaning of this ordinance, that when any of said lands have been occupied and possessed under and by virtue of a lease or demise, they shall be deemed to have been

in the possession of the landlord or lessor under whom they were so occupied or possessed."

So that by the "Van Ness Ordinance" no new title was conferred, and the original grant having been judicially determined to be "*invalid*," no new life could (we respectfully submit) be given to it by the Legislature, so as to defeat the judgment of the highest judicial tribunal of the State.

Upon the 16th page (at the bottom thereof) the learned Judge rendering the opinion in this cause quotes a portion of the 5th section of the Act of Congress of July 1, 1865. Under this Act of Congress the plaintiff in Error could certainly loose no rights, for in the last clause of the said 5th section of the Act referred to, occurs the following proviso, viz:

"And provided that the relinquishment and grant by this Act shall in no manner interfere with or prejudice any *bona fide* claims of others, whether asserted adversely under rights derived from Spain, Mexico, or the laws of the United States, nor preclude a judicial examination and adjustment thereof." Surely under this Act no advantage was afforded the defendants.

For convenience we will quote the whole of said 5th section, which is as follows, found on page 333, U. S. Statutes at large, vol. 13.

"Section 5. And be it further enacted that all the right and title of the United States to the land within the corporate limits of the city of San Francisco as defined in the Act incorporating said city, passed by the Legislature of the State of California

on the 15th of April, 1851, are hereby relinquished and granted to the said city, and its successors for the uses and purposes specified in the ordinances of said city, ratified by an Act of the Legislature of the said State, approved on the 11th of March, 1858, entitled "An Act concerning the City of San Francisco, and to ratify and confirm certain ordinances of the Common Council of said City," there being excepted from this relinquishment and grant, all sites or other parcels of lands which have been or now are occupied by the United States for military, naval or other public uses, or such other sites or parcels as may hereafter be designated by the President of the United States within one year after the rendition to the General land office by the Surveyor-General, of an approved plat of the exterior limits of San Francisco, as recognized in this section in connection with the lines of the public surveys, *and provided that the relinquishment and grant by this Act shall in no manner interfere with or prejudice any bona fide claims of others, whether asserted adversely under rights derived from Spain, Mexico or the laws of the United States, nor preclude a judicial examination and adjustment thereof.*"

We therefore respectfully suggest that no new title is shown whatever, but that the Act of Congress, the law of the State and the Ordinance of the City, each and all *saved* the rights of third parties. Further, that it was not within the power, and certainly not within the purview and intent of the law to annul and invalidate a decision of the Supreme Court of the State of California, because

if it be true that without the above laws Woodworth had as against Fulton no *title*, it must be admitted that he received none by the above enactments.

We further respectfully submit that this suit was brought some five years previous to the passage of the Act of 1865; and the opinion bears date June 2, 1863, according to the Transcript, page 17, although this is evidently a misprint, it should have been June 26, 1865, (the date of the judgment) and thus would also be prior to the passage of said law, which was upon July 1, 1865.

But the settled construction of the Act of Congress and the law of the Legislature is, that *quoad* third parties it leaves them free to settle their disputes in the Courts of the country.

We therefore respectfully submit that upon the two propositions enunciated at the outset of this brief, and the authorities and views above presented, the judgment herein entered should be set aside.

GEORGE TURNER,
W. H. PATTERSON.
JARBOE & HARRISON,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

CHARLES MERRYMAN

vs.

E. W. BOURNE, WOODWORTH, ET. AL.

Brief for Defendants in Error.

This is an action of ejectment.

Plaintiff, in order to recover, must show that he has a valid title to the premises in controversy. To dispossess defendants it is not sufficient for him to show a defect in their title, he must affirm and establish in himself a legal right to the property and its possession.

Chitty, in his note to Blackstone, 2d. vol., page 196, says: "In general a person in actual possession of real property cannot be ousted unless the party claiming can establish some well founded title; for it is a general rule governing all actions of ejectment that the plaintiff must recover upon the strength of his own title, and of course he cannot in general found his claim upon the insufficiency of the defendant's. For possession gives the defendant a right against every person who cannot show a sufficient title, and the party who would change the possession must therefore establish a perfect title," &c.

Plaintiff does not pretend to have any title except through a grant made in 1849, by one Colton, a justice of the peace in San Francisco.

Judges Field and Hoffman find this title to be null and void. No law or facts can be found anywhere to support it, and indeed plaintiffs do not pretend that in itself it has any validity.

This court must therefore necessarily find upon this question as did the court below, against the plaintiff.

Plaintiff claims, however, that defendants are estopped by the decision of the Supreme Court of California.—(1 Cal. R., page 295.)

Several conclusive answers may be made to this position.

1st. That decision simply disaffirms defendants' title. It does not affirm the title of plaintiff.

Assuming that Woodworth could not dispossess Merryman, which that case in effect holds, it does not follow that Merryman can dispossess Woodworth in possession, as the court below find, without "force, fraud, or surprise."

It may be that neither party has title, and therefore the one in possession will hold.

Plaintiff must show that in some litigation to which defendants were parties or privies the court decided that the Colton grant was good, otherwise plaintiff's position is without force.

There is nothing like such a decision in the case cited.

2d. Subsequent to the said decision in 1st Cal. Reports, Woodworth brought an action of ejectment in the District Court of the 4th Judicial District of the state against those in possession under the Colton grant, and recovered judgment.

While that judgment continues unreversed and in full effect as it now does, it will protect Woodworth in the possession which it gave to him.

Plaintiffs assume in their brief that the persons dispossessed by those proceedings were tenants of plaintiff, and that he had no notice of the suit, &c.

Nothing appears in the record to show that plaintiff had any claim to this property till April 11th, 1855, which was subsequent to some if not all these proceedings; nor does it appear that the persons sued were tenants, but they are described in the record as "persons claiming

under said Fulton," and said Fulton is described as a person claiming under said Atwell, to whom Colton made the grant.

Again, the court below finds that the possession of Woodworth, obtained under the writs of restitution and by surrender, "was fairly and honestly acquired without force, fraud, or surprise." No question as to want of notice to landlord or collusion with tenants can be raised upon this finding.

Doubtless the decision of the district court was not disturbed, and the surrender of the persons not sued was made, because the Supreme Court of California in 1853 reversed its former decision, and held that an alcalde grant, under which Woodworth claims, conveyed title, and such has been the uniform course of decisions of that court since that time.

Cohan vs. Raisin, 3 Cal., 443.
Hart vs. Burnett, 15 Cal., 530.
White vs. Moses, 21 Cal., 34.

Much is said and authorities are cited in plaintiff's brief to show that the decision in 1st California is the law of the property in question.

Is it any more the law of the property in question than the subsequent decision of the district court?

Suppose an appeal had been taken to the supreme court from the decision of the district court affirming plaintiff's title, and the case in 1st Cal. had been reversed, as it certainly would, what then would have been the law of the property?

Is not this in effect the condition of the law as to the premises in dispute?

Judges Lyon and Bennett held in 1st Cal. that all alcalde grants after a certain date were void. Chief Justice Hastings dissented.

Soon afterwards the same court adopted the opinion of the chief justice as to such grants. Plaintiff then brought suit and recovered.

That new and better opinion of the court was the ground of his recovery. It then became and is the law of this property. But this point avails nothing, for there was no decision in 1st California as to plaintiff's title, which is the question in this case, but that decision was altogether as to defendant's title.

Justice Johnson, in delivering the opinion of the New York Court of Appeals in Dunckel vs. Miles, 1st Kernan, 426, says:

"It is not upon a possibility or probability however strong that an estoppel can rest. The matter of the estoppel must virtually have come in question and been determined. The burden of showing that it did come in question must fall upon the party who seeks the benefit of the estoppel, for it is a part, and a necessary part of his case."

3d. Be the effect of the case in 1st California what it may upon the rights of the parties as they then stood, defendants can set up in their suit a subsequently acquired title.—(3 Cowan, 559.)

The Van Ness Ordinance; the act of the legislature of California, passed March 11th, 1858, and the act of Congress of July 1st, 1864, are equivalent to a patent from the United States to Woodworth for this property.—(Record, page 16.)

It is not denied that the grant to Woodworth is one of those described in and made good by this legislation.

Woodworth either has or has not the title. If he has, and may assert it in this action, then necessarily the judgment of the court must be for him.

Any pretended equities of plaintiff must be asserted elsewhere; here the legal title will prevail.

Manifestly, upon the facts and the settled law, defendants are entitled to the land in question, and the court will not strain the technical effect of such a case as the one in 1st California to produce a contrary result.

GEO. H. WILLIAMS,
Counsel for Defendants in Error.